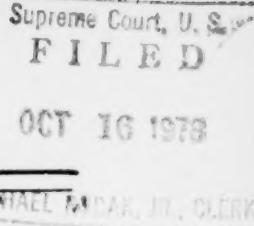


78-635



In the Supreme Court of the United States

ACOUSTI ENGINEERING COMPANY
OF FLORIDA
PETITIONER

v

JOHN H. SEA and CLAY MORT., et al,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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TO THE SUPREME COURT OF
THE UNITED STATES

Petitioner, Acousti Engineering Company of Florida, presents this, its Petition for a Writ of Certiorari and states:

1. Petitioner seeks to have reviewed an Order of the Supreme Court of Florida dated July 18th, 1978 denying a Petition for a Writ of Certiorari to the District Court of Appeal, First District, State of Florida. Copies of the Final Judgment, the Decision of the District Court of Appeal, First District, State of Florida and the Order of Supreme Court of the State of Florida denying Certiorari

are attached hereto in Respondent's Appendix. The Decision of the District Court of Appeal, First District, State of Florida, is reported at 352 So 2d, 1250. The Order of the Supreme Court of Florida denying Petitioner's Petition for a Writ of Certiorari is as yet unreported.

2. The date of the Order sought to be reviewed is July 18th, 1978.

3. There was no Order respecting a rehearing and there was no Order granting an extention of time within which to Petition for a Certiorari.

4. Petitioner relies on 28 United States Code, Section 1257 (3) to confer jurisdiction upon this Honorable Court inasmuch as both the original Final Judgment, the Decision of the District Court of Appeal, First District, State of Florida and the Supreme Court of Florida all based their determinations upon their interpretation of a Federal Statute, specifically 29 United States Code, Section 186 (c) (5) (B)

5. The question presented for review is:

May an employer validly make and Union Trustees validly accept fringe benefit payments during a period of time where there is no written Collective Bargaining Agreement in effect specifying such payments.

6. The statutory provision which the case involves is Title 29 of the United States Code, Section 186 (c) (5) (B) which is the statutory codification of the Labor Management Relations Act of 1947, Public Law #101, Section 302, 61 Stat. 136 (1947), set out verbatim in the Petitioner's Appendix.

7. The case, concisely stated was that the Petitioner had a written Collective Bargaining Agreement outlining the Trust Fund payments in question for a period to and including April 30th, 1974. The Petitioner had no written

Collective Bargaining Agreement outlining the trust payments in question for the period May 1, 1974 through September 12, 1974. The Petitioner again signed a written Collective Bargaining Agreement outlining the said Trust Fund payments on September 13, 1974. The Petitioner inadvertently made Trust Fund payments to the Respondent Trustees of the Trust Fund during the period May 1, 1974 through September 12, 1974. The trial court held that said payments during the said period May 1, 1974 through September 12, 1974 were illegal by virtue of 29 United States Code, Section 186 (c) (5) (B) and ordered them repaid to the Petitioner. On Appeal, the District Court of Appeal, First District, State of Florida reversed, holding:

"Applying these facts to the legislative purposes of the subject statute, we conclude that Acousti, by its acts, ratified the subject contract as of May 1, 1974."

A Petition for Rehearing was filed and denied and the Supreme Court of the State of Florida denied a Petition for a Writ of Certiorari.

8. The Federal question sought to be reviewed was raised in the trial court by virtue of a counter-claim and the trial court specifically based part of its Final Judgment upon the said above referenced Federal Statute.

9. This case involves a State court's interpretation of controlling Federal law and the same point of law was involved in the case of **Moglia v. Geoghegan** (CA2) (1968), 403 F2d 100 cert den 394 US 919, ___L.Ed. ___, 89 S.Ct. 1193, decided by the United States Court of Appeals, Second Circuit, on the 6th day of November, 1968. The facts involved in **Moglia v. Geoghegan** were as follows:

(a) From July 1, 1953 thru March 31, 1965, Moglia's employer for 28 years, Elmhurst Contracting Company made payments into a pension fund on behalf of Moglia

and other employees and such payments were received and accepted by the trustees of the pension.

(b) During this period the books of Elmhurst were regularly audited by the auditors for the Fund to assure that payments were being made in the proper amounts.

(c) On April 15th, 1965, Moglia filed an application for a pension with the Fund.

(d) Elmhurst had never signed a written Collective Bargaining Agreement with the Union delineating the trust fund payments, even though other employers had.

(e) The trustees of the Trust Fund denied the application for pension for reason that the payments were prohibitive by 29 USC, Section 186 (c) (5) (B).

(f) Moglia died and his widow filed suit.

10. On the foregoing facts the United States Court of Appeals, Second Circuit, was presented with the following point of law:

May an employer engaged in commerce legally make and Union trustees legally receive payments into a trust fund during such time as there is not a written agreement with the employer delineating such payments?

On this point of law, the United States Court of Appeals, Second Circuit, rendered the following decision or holding:

The employer's payment into the Fund and the trustees receipt of said payments were prohibited by Section 302 in the absence of a written agreement as required by subsection 302 (c) (5) (B). The equitable estoppel argument cannot supply the essential element of the written agreement Congress required by subsection 302 (c) (5) (B). It would be illegal for the trustees to retain the contributions of the employer.

11. The United States Court of Appeals, Second Circuit

further stated in footnote 8 of the case of **Moglia v Geoghegan, supra**, as follows:

"At 267 F.Supp 641, 643, 648, the district judge appears to indicate by dicta that a present execution by the employer of the collective bargaining and trust agreements could validate the 36 months of pension payments appellant claims were payable to her month by month from May 1, 1965 to April 1, 1968, and could legalize the abortive payments by Elmhurst to the Fund. Though we approach the resolution of the dispute between the parties by the same route taken by the district judge we point out that we are not adopting this dicta."

12. The Court below in holding that the trust payments were valid during a period in which there was no written Collective Bargaining Agreement by virtue of the fact that the said bargaining agreement was ratified by the Petitioner's acts essentially treated the Petitioner's making payments during the prohibited period as estopping Petitioner from claiming that the payments were illegal. This contention was expressly rejected in **Moglia v. Geoghegan, supra**, as was the contention that subsequent execution of a collective bargaining agreement could retroactively give validity to the payments during a period theretofore prohibited. This was also the holding of the Supreme Court of Washington in the recent case of **Trust Fund Services v. Heyman** (SC Wash.) (1977), 565 P.2d 805, wherein the Court stated at Page 811 as follows:

"(12) Upon one aspect of the case, we must agree with the petitioner. He cites **Moglia v. Geoghegan**, 403 F.2d 110 (2nd Cir. 1968), holding that, under Section 302 of the Labor Management Relations Act of 1947 (29 USC Section 186), a trust fund agreement is invalid unless it is in writing, and that such an agreement cannot be established by resort to principles of estoppel."

For reasons stated, the Petitioner respectfully submits

that the Order of the Supreme Court of Florida below upholding the decision of the District Court of Appeal, First District, State of Florida, misconstrues the meaning of the applicable provision of the United States Code as interpreted by the highest Federal Court interpreting the same question and for reason therefore Petitioner respectfully prays that Petition for a Writ of Certiorari be granted and that the decision of the District Court of Appeal, First District, State of Florida, be quashed.

Respectfully submitted this 14th day of October, 1978.

ALBERT S. C. MILLAR, JR.,
Counsel for Petitioner
1239 King Street
Jacksonville, Florida 32204

October 1978.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Lacy Mahon, Esquire, 350 E. Adams Street, Jacksonville, Florida 32204, by U. S. Mail, this 14th day of October, 1978.

/s/ ALBERT S. C. MILLAR, JR.
Counsel for Petitioner

In the Supreme Court of the United States

**ACOUSTI ENGINEERING COMPANY
OF FLORIDA,
PETITIONER**

v.

**JOHN H. SEA AND CLAY MORT, ET AL.,
RESPONDENTS**

PETITIONER'S APPENDIX

JUDICIAL CIRCUIT IN AND FOR
DUVAL COUNTY, FLORIDA.

CASE NO. 75-11448-CA
DIVISION "K"

JOHN H. SEA and CLAY MORT, etc., et al,
Plaintiffs,

vs.

ACOUSTI ENGINEERING COMPANY
OF FLORIDA,
Defendants.

FINAL JUDGMENT

This cause having come on for trial without a jury and the Court having heard the testimony, and the Court having reviewed the evidentiary exhibits, and the stipulations of the party made on the record, and the Court having heard argument of counsel, the Court makes the following:

FINDINGS OF FACT

1. The two Collective Bargaining Agreements introduced into evidence were signed by the Defendant, by and through its officers, with the actual and/or apparent authority so to act.
2. There was no signed Collective Bargaining Agreement in effect from May 1, 1974 thru September 12, 1974 between the Defendant and the Carpenters District Council of Jacksonville.
3. The Collective Bargaining Agreement for the period May 1, 1974 to April 30th, 1976 was not signed until September 13, 1976 by the Defendant herein.

4. The amounts contained in this judgment were stipulated to by the parties based upon the Court's determination of the legal liability as to the respective parts of the complaint and counter-claims.

5. Based upon these findings, the Court makes the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties hereto and of the subject matter hereof.

2. As to that part of Plaintiff's claim which corresponds to the First Affirmative Defense contained in the Defendant's Amended Answer, the Court finds that the Plaintiff's construction of the contracts are correct to the effect that employees must be paid fringe benefits for partial months worked, eventhough they were not on the payroll at the end of the month, and the court assesses damages against the Defendant as to this part of Plaintiff's claim in the amount of \$3,941.09.

3. As to that part of Plaintiff's Complaint which corresponds to the Second Affirmative Defense contained in the Amended Answer filed by the Defendant, the Court finds that the Plaintiff's construction of the contracts are correct to the extent that fringe benefits must be paid by the Defendant for all hours worked at the straight time fringe benefit rate and the Court assesses damages against the Defendant as to this part of Plaintiff's claim in the amount of \$3,383.10.

4. As to that part of Plaintiff's Complaint which corresponds to the Third Affirmative Defense contained in the Defendant's Amended Answer, the Court notes that the Plaintiff withdrew this contention at the outset of the case, and accordingly, the Court finds for the Defendant as to the Third Affirmative Defense.

5. As to that part of Plaintiff's claim which corresponds with the Fourth Affirmative Defense contained in the Defendant's Amended Answer, the Court finds that the Plaintiff withdrew any contention for payment for non-members of CDC, and consequently the Court finds for the Defendant as to the Fourth Affirmative Defense.

6. As to that part of Plaintiff's claim which corresponds to the Fifth Affirmative Defense contained in the Defendant's Amended Answer, the Court makes the same ruling as it did with the Second Affirmative Defense, for the same reason and assesses damages against the Defendant for this part of Plaintiff's claim in the amount of \$87.04.

7. As to that part of Plaintiff's claim which corresponds to the Sixth and Seventh Affirmative Defenses contained in the Defendant's Amended Answer, the Court finds that the Defendant's construction of the contract is correct, and finds for the Defendant as to both of these defenses.

8. The Court's ruling on the Eighth Affirmative Defense of the Defendant's Amended Answer is the same as the Court's ruling on the First Counter-Claim of the Defendant, and the hours worked during this time period have been deducted from the amounts due Plaintiff pursuant to paragraph 2, 3 and 6 of these conclusions of law.

9. As to the Defendant's First Counter-Claim, the Court, based upon the finding that there was no signed Collective Bargaining Agreement in effect between the period May 1, 1974 thru September 12, 1974 must necessarily conclude that any payments made by the Defendant to the Plaintiff during that period of time as and for fringe benefits were illegal under 29 U. S. Code, § 186 (c) (5) (B) and (7) and must be repaid to the Defendant by the Plaintiff. Accordingly, the Court assesses damages against the Plaintiff in the amount of \$28,356.48 on the Defendant's First Counter-Claim.

10. As to the Defendant's Second Counter-Claim, this Counter-Claim is for a Declaratory Judgment, which declarations have been included in the Findings of Fact and Conclusions of Law contained herein.

WHEREFORE, IT IS ADJUDGED after deducting the amounts found due Plaintiff by Defendant from the amount found due Defendant by Plaintiff, the Court enters judgment against the Plaintiff in favor of the Defendant in the amount of \$20,931.25, for all of which let execution issue.

DONE and ORDERED at Jacksonville, Florida this 10th day of May, 1976.

John E. Santora
Circuit Judge

copies furnished to:

Al Millar, Esquire
1239 King Street
Jacksonville, Florida 32204

Bartley K. Vickers, Esquire
350 E. Adams Street
Jacksonville, Florida 32202

John H. SEA and Clay Mort, etc., et al., Appellants,

v.

ACOUSTI ENGINEERING COMPANY OF FLORIDA, Appellee.

No. DD-74.

District Court of Appeal of Florida,
First District.

Dec. 15, 1977.

Rehearing Denied Jan. 6, 1978.

Action arose out of a contractual dispute between an association of labor unions and a contractor as to payment by contractor of fringe benefits. The Circuit Court, Duval County, John E. Santora, Jr., J., entered judgment against union trust fund on ground that fringe benefits paid by contractor were illegal, and fund appealed. The District Court of Appeal, Rawls, A.C.J. held that payments made by contractor to union trust fund in form of fringe benefits prior to time contractor executed written bargaining agreement with union were not violative of Labor Management Relations Act where parties had not only operated under a previous bargaining agreement, but contractor had ratified new agreement by such acts as entering into negotiations for same prior to expiration of old agreement and by thereafter employing union members and paying them wages in accordance with newly negotiated agreement.

Reversed and remanded with directions.

1. Labor Relations  131.6

Payments made by contractor to union trust fund in form of fringe benefits prior to time contractor executed

written bargaining agreement with union were not violative of Labor Management Relations Act where parties had not only operated under a previous bargaining agreement, but contractor had ratified new agreement by such acts as entering into negotiations for same prior to expiration of old agreement and by thereafter employing union members and paying them wages in accordance with newly negotiated agreement.

2. Labor Relations 257

Phrase "straight time only," within provision of bargaining agreement requiring employer to pay fringe benefits at straight time rate for every hour worked, including overtime, modified and qualified phrase "every hour worked" and operated to require employer to make payments on every hour worked, straight time only, for a maximum of 40 hours per week.

See publication Words and Phrases for other judicial constructions and definitions.

Bartley K. Vickers of Mahon, Farley & Vickers, Jacksonville, for appellants.

Al Millar, Jr., of Millar & Lally, Jacksonville, for appellee.

RAWLS, Acting Chief Judge.

This appeal arises out of a contractual dispute between an association of labor unions and a contractor as to the payment by the contractor of fringe benefits. Appellants, trustees of certain trust funds, filed their complaint. Appellant Sea is one of the trustees and the business representative of the Carpenters District Council of Jacksonville, and appellee Acousti is a construction company.

Acousti and the union operated under a collective bargaining agreement that terminated on May 1, 1974. A

new agreement was negotiated between an association of general contractors of which Acousti was a member and the union, which provided that the employer would make certain payments to trust funds designated as an apprenticeship fund, a health and welfare fund, and a pension and a vacation fund; such being customarily referred to as "fringe benefits". This "new agreement" was reached during the latter part of April, 1974. However, Acousti did not formally sign the written agreement until September 13, 1974, although during the period intervening from May 1, 1974, Acousti made substantial payments to the trust funds in accordance with the provisions of the written agreement that it had not executed.

The trial court held that Acousti's payments for fringe benefits violated the provisions of 29 U.S.C. § 186(c)(5) (B) and (7) (Taft Hartley Act of 1947)¹ and assessed damages against the union trust fund in the sum of \$28,356.48; hence this appeal.

After extensive investigations, Congress discovered abuses which seemed to be inherent in funds created and maintained by contributions exacted from employers, but which were administered by union officials without any obligation to account to the contributors or to union membership. Thus, an essential provision of the Taft Hartley Act of 1947 prohibited the contribution by an employer to any union except in narrow circumstances. The narrow exception with which we are here concerned is found in the following provision, viz:

" . . . (c) The provisions of this section shall not be applicable . . . (5) with respect to money . . . paid to a trust fund . . . Provided . . . (B) the detailed basis on which such payments are to be made

1. Labor Management Relations Act of 1947, Pub. L. No. 101, § 302, 61 Stat, 136 (1947).

is specified in a written agreement with the employer . . ."

The trial court held that the above cited provisions rendered the fringe benefit payments to have been illegal.

Acousti argues in its brief that **Moglia v. Geoghegan**² and **Bricklayers, Etc., U. 15, Fla. v. Stuart Plaster. Co., Inc.**,³ mandate an affirmance. We do not agree. **Moglia** involved a claim to a pension fund which the employer had made contributions. However, an important fact is that the non-union employer in **Moglia** had never entered into a collective bargaining agreement with the union. Likewise, **Bricklayers** is not applicable. In **Bricklayers**, the collective bargaining agreement was in numerous respects in clear violation of the Taft Hartley Act and, as a result of such violations, the trust funds had been flagrantly mismanaged. The facts in **Bricklayers** amply demonstrate the foresight of Senator Taft's explanation that "the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose which they may think is to the advantage of the union or the employee."⁴

(1) Unlike the facts in **Moglia**, Acousti had a valid labor agreement with the union prior to May 1, 1974. Ninety days prior to the expiration of this agreement, negotiations were begun between the association of contractors and the union. A representative of Acousti partici-

pated in these negotiations, resulting in the formulation of a written contract which was ratified by the union a few days prior to May 1, 1974. Acousti employed the union members after May 1, 1974; paid them wages and some fringe benefits pursuant to the written contract; and on September 13, 1974, signed the written contract. That the subject written instrument is in compliance with the Labor Management Relations Act has not been questioned. Applying these facts to the legislative purposes of the subject statute, we conclude that Acousti, by its acts, ratified the subject contract as of May 1, 1974. The Taft Hartley Act was enacted as a shield for all parties; not as a sword for Acousti's use.

(2) By cross-assignment, Acousti challenges the trial court's construction of the following contractual provision, viz:

"Contractors signatory to this Contract agree to pay into the Carpenters District Council of Jacksonville and Vicinity Health & Welfare Fund based on every hour worked for the Contractors by members of the C.D.C., apprentice hours included, straight time only, according to the schedule under Article XXVI, WAGES."

requiring the employer to pay fringe benefits at the straight time rate for every hour worked, including overtime. Acousti contends that the plain meaning of this paragraph requires it to make payments on every hour worked—straight time only, i.e., a maximum of 40 hours per week. In support of its construction of the disputed paragraph, Acousti produced Dr. Marly J. Lyde, Professor of English and Chairman of the Division of Humanities, Jacksonville University, who, after diagramming the sentence, opined that "straight time only" modified and qualified the phrase "every hour worked". We agree. The trial court erred in its construction of the disputed paragraph.

2. *Moglia v. Geoghegan*, 403 F.2d 110 (2nd Cir. 1968), cert. den. 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969).

3. *Bricklayers, Etc., U. 15, Fla. v. Stuart Plaster Co., Inc.* 512 F.2d 1017 (5th Cir. 1975).

4. *Id.* quoting 93 Cong. Rec. 4876 (1947).

The judgment appealed is reversed and remanded with directions that a final judgment be entered in accordance with this opinion.

SMITH and ERVIN, JJ., concur.

SUPREME COURT OF FLORIDA

TUESDAY, JULY 18, 1978

ACOUSTI ENGINEERING COMPANY, etc.,
Petitioner,

v.

JOHN H. SEA, et al.,
Respondents.

CASE NO. 53,332

DISTRICT COURT OF APPEAL,
FIRST DISTRICT
DD-74

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional brief and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ENGLAND, C.J., BOYD, SUNDBERG, HATCHETT
and ALDERMAN, JJ., concur

§ 186. Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdictions; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

* * *

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

* * *

(c) The provisions of this section shall not be applicable
(1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or

dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: **Provided**, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): **Provided**, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree

within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: **Provided**, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.

* * *